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No. 76-1098

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARATHON OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

STANLEY D. ROSE,
C. MAX VASSANELLI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 1a-17a) is reported at 547 F.2d 1140. The opinion and order of the United States District Court for the Northern District of Ohio (Pet. App. 18a-24a) have not been reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on December 6, 1976, and a

petition for rehearing, with a suggestion for rehearing *en banc*, was denied on January 10, 1977 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 8, 1977. The jurisdiction of the Court is invoked under 15 U.S.C. (Supp. V) 754(a)(1), and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Emergency Petroleum Allocation Act of 1973 authorizes the Federal Energy Administration to regulate the credit terms and payment schedules used in sales of regulated petroleum products.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. 38a-49a.

STATEMENT

Section 4(a) of the Emergency Petroleum Allocation Act of 1973 (the Allocation Act), 87 Stat. 627, 629, 15 U.S.C. (Supp. V) 753(a), provides in pertinent part:

> the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

Pursuant to that directive, the Federal Energy Administration,[1] has promulgated Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 210 through 212. The price regulations provide in essence that suppliers of allocated products may not charge any "class of purchaser" more than specified prices, usually determined as the price lawfully charged on May 15, 1973, plus certain amounts allowed to recover cost increases.[2] The regulations include a provision pertaining to "Normal Business Practices,"[3] 10 C.F.R. 210.62, which currently provides in pertinent part:

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[1] Regulations under the Allocation Act were first promulgated in January 1974 (see 39 Fed. Reg. 744, 1931) by the Federal Energy Office, to which the President had delegated his authority under the Allocation Act and portions of his authority under the Economic Stabilization Act of 1970. See Executive Order 11748, 38 Fed. Reg. 33575. The Federal Energy Administration was created on June 27, 1974, and assumed the responsibilities of the Federal Energy Office. Executive Order No. 11790, 39 Fed. Reg. 23185.

[2] See 10 C.F.R. 212.73, 212.82, 212.93.

[3] The Normal Business Practices regulation was first promulgated under the Allocation Act on January 2, 1974, and provided in pertinent part that "no supplier may require or impose discriminatively more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier * * *" (39 Fed. Reg. 748-749). Before it was to go into effect the regulation was revised on January 15, 1974, to provide in pertinent part that "no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (*e.g.*, COD purchasers) during the base period * * *" (39 Fed. Reg. 1931).

Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. * * * Nothing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products, as customarily associated with that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms). However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms).[4]

Petitioner filed this action in the United States District Court for the Northern District of Ohio to enjoin the enforcement of this regulation. The district court granted petitioner's motion for summary judgment, holding that the Allocation Act did not

[4] The regulations define "class of purchaser" as "purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers" (10 C.F.R. 212.31). "Customary price differential," in turn, is defined as "includ[ing] a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery" (*ibid.*).

authorize FEA to regulate credit terms in the sale of allocated products (Pet. App. 18a-24a).[5]

The Temporary Emergency Court of Appeals reversed. The court recognized that the regulation of credit terms and other business practices in the sale of allocated products was "tied closely" to the regulation of prices (Pet. App. 7a) and that the authority for such regulation was fairly implied in the broad statutory mandate of Section 4(a) of the Allocation Act (Pet. App. 13a). Moreover, on the basis of its review of the legislative history of the Economic Stabilization Act of 1970 and the Allocation Act and the regulations promulgated under both, the court concluded that Congress intended that FEA continue to exercise the authority, formerly exercised by the Cost of Living Council, to regulate credit terms (Pet. App. 8a-12a).[6]

[5] Petitioner also challenged another regulation, concerning the rental of real property. The district court concluded that that regulation also was invalid, relying upon the decisions of the Temporary Emergency Court of Appeals in *Shell Oil Co.* v. *Federal Energy Administration*, 527 F. 2d 1243, and *Atlantic Richfield Co.* v. *Zarb*, 532 F. 2d 1363. No appeal was taken from that portion of the judgment.

[6] As the court of appeals outlined in its opinion (Pet. App. 8a-10a), the FEA's credit regulation was a continuation of regulations promulgated for petroleum products by the Cost of Living Council during Phase IV of the Economic Stabilization Act of 1970. Although the CLC did not generally regulate interest rates and credit terms under the Stabilization Act, it did so with petroleum products through its "class of purchaser" rules, which were largely incorporated in the FEA's allocation and price rules. Under the CLC regulations, as under FEA's regulations, a "class of purchaser" was defined as a purchaser who had been charged "a comparable price for

Finally, the court held that its decisions in *Shell Oil Co.* v. *Federal Energy Administration*, 527 F. 2d 1243 (T.E.C.A.), and *Atlantic Richfield Co.* v. *Zarb*, 532 F. 2d 1363 (T.E.C.A.), holding that FEA was without authority to regulate real estate rentals, did not establish the invalidity of the credit regulation, since "[c]redit terms are more clearly a function of pricing and allocation than service station rentals" (Pet. App. 15a-16a).

The court remanded the case to the district court for further consideration of issues relating to the validity of the provisions in 10 C.F.R. 210.62(a) specifically concerning "summer fill" and other "dating" practices, which the district court had not addressed (Pet. App. 16a).[7] The court denied a petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. 17a).

ARGUMENT

The Temporary Emergency Court of Appeals correctly held that the Allocation Act authorizes the

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comparable property or service pursuant to customary price differentials between those purchasers * * * and other purchasers." 6 C.F.R. 150.352 (1974); 10 C.F.R. 212.31 (1976). "Customary price differential" in turn was defined as a "price distinction based on [*inter alia*] a term or condition of sale or delivery" (6 C.F.R. 150.31 (1974)). See also 10 C.F.R. 212.31 (1976).

[7] The district court apparently concluded that those provisions were part of the regulation of terms of credit and, having found that FEA was without authority to regulate credit terms, determined that they were invalid (Pet. App. 21a).

FEA to regulate credit terms offered by suppliers in the sale of allocated petroleum products. There is no conflict on this issue among the circuits or within the Temporary Emergency Court of Appeals. Indeed, the latter court denied petitioner's suggestion for rehearing *en banc* based on an alleged conflict. The Temporary Emergency Court of Appeals was specially established by Congress to decide questions arising under, *inter alia*, the Allocation Act, and the decision below was based on that court's special familiarity with the Act and its administration. The decision affirms a reasonable interpretation of the Act by the agency established to administer it and does not warrant further review.

1. Section 4(a) of the Allocation Act constitutes a broad authorization and directive to allocate petroleum products and, in connection with the allocation, to regulate the prices of allocated products. The statute speaks broadly of "prices specified in (or determined in a manner prescribed by) such regulation."

Congress recognized that the regulation of price is critical to the effective allocation of petroleum products in times of severe shortage and that regulatory authority should be broadly construed to effectuate the declared statutory purpose "of minimizing the adverse impacts of such shortages and dislocations on the American people and the domestic economy." 15 U.S.C. (Supp. V) 751(b). *Cities Service Co.* v. *Federal Energy Administration*, 529 F. 2d 1016 (T.E.C.A.), certiorari denied, 426 U.S. 947;

Condor Operating Co. v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976.

As the court below correctly held (Pet. App. 13a-14a), the authority to regulate credit and other terms in the sale of allocated products is necessary to regulate effectively the price of allocated products and is implicit in the authority to regulate prices. Credit terms and payment schedules are inseparably related to the listed price of a product; together they constitute the consideration for the product. Changes in credit terms are functionally equivalent to changes in price and have largely the same capacity to disrupt the allocation of products and to cause dislocations in the economy.

Consider a supplier who in May 1973 permitted a class of purchasers to pay for products 30 days after delivery without interest. For that supplier now to require that class of purchasers to pay "interest" at the rate of 12 percent per annum on payments made after delivery would be functionally equivalent to raising the price one per cent and then offering a one percent discount to those who pay on delivery. To the extent a purchaser's cash flow or other circumstances make it impracticable for him to pay on delivery, the imposition of an interest charge for what was formerly a customary allowance constitutes an effective increase in price for the product.[8]

[8] Even if the purchaser can resort to the credit market to enable him to pay cash on delivery, what he would effectively pay for the product would be the May 1973 price plus the interest expense incurred.

Furthermore, in the case of purchasers whose businesses have developed in reliance on the supplier and his customary credit terms and payment schedules, changes in those terms and schedules may disrupt the supply of the product as completely as would a severe increase in price.

Petitioner argues (Pet. 13-14) that credit (of which payment schedules are an aspect) is fungible, that a purchaser can resort to the credit market when the supplier imposes credit terms and payment schedules in excess of the going rate for credit, and therefore that credit is separate from and unrelated to the price of allocated products. That argument ignores, first, the realities of the industry, in which credit terms and payment schedules furnished by the supplier are an integral part of the distribution system. As petitioner itself stresses, "[v]irtually every seller of crude oil or petroleum products enters into some form of credit transaction with his purchasers" (Pet. 7). Since credit arrangements between sellers and purchasers pervade the distribution system, it is unrealistic to contend that "customers would always have the option of obtaining credit in the open market and paying cash to the seller for any products purchased" (Pet. 14).

Second, the argument ignores the nature of the credit offered by a seller in connection with the sale of his product. That credit is not fungible in the sense that it is equally available, on the same terms, from independent lenders. Rather, when a supplier offers some form of credit (*e.g.*, the privilege to defer payment for 30 days after delivery) in connec-

tion with the sale of his product, it is offered as an inducement to encourage or facilitate the purchase and thus ordinarily is offered on terms more favorable than those available in the credit market generally. In short, credit terms are an integral part of the consideration for which the purchase price is paid.

Petitioner relies (Pet. 8-9) on *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, for the proposition that credit is unrelated to price. In fact, for purposes of the issue here, that decision establishes precisely the opposite. There, the Court held that when a company lends money at favorable rates to a borrower for the purchase of real estate on condition that the borrower buy some of the company's pre-fabricated houses, the transaction constitutes an illegal tying arrangement involving two products—credit and pre-fabricated houses. However, the Court emphasized that its holding would not affect the ordinary credit sale, where the credit is offered in connection with the product sold, saying, "In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product." 394 U.S. at 507.[9] The regulation here is concerned only with

[9] Petitioner's further reliance (Pet. 9) on *Craig* v. *Sun Oil Co.*, 515 F. 2d 221 (C.A. 10), also is unfounded. There the plaintiff alleged that the defendant had given plaintiff's competitor more favorable credit terms than plaintiff had been given, in violation of the Robinson-Patman Act, 15 U.S.C. 13. The court rejected the allegations primarily on the ground that "[i]t is clear that the allegations of price discrimination are based on several billing errors made by Sun, but which were corrected." 515 F. 2d at 224. The court went on to express the view that discrimination in credit terms usually would not constitute a violation, since differences in credit are based on numerous judgmental factors, but stressed that in some circumstances discrimination in credit of sufficient magnitude or nature might constitute a violation.

credit terms in connection with the sale of allocated products; it does not purport to regulate credit arrangements which are unrelated to sale of allocated products.[10]

2. Although the Allocation Act does not expressly refer to credit terms or payment schedules in its delegation of authority, it is well settled that a broad congressional delegation of authority to an administrative agency confers the authority to issue regulations which are necessary and proper to the effectuation of the statutory purpose. This Court noted in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777:

> This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; * * *. We cannot, in these circumstances, conclude that Congress has given authority in-

[10] A wide variety of credit arrangements are employed in the sale of allocated petroleum. Whether particular credit arrangements are related to the sale of allocated products and thus fall within the scope of the regulation are questions to be decided in each particular case on the basis of the circumstances involved, and not in the context of petitioner's broad challenge to the validity of the regulation. Similarly, whether or not FEA has incorrectly decided particular cases, as amici suggest (Am. Br. 7-8), is not at issue here.

adequate to achieve with reasonable effectiveness the purposes for which it has acted.

Those principles are particularly pertinent here, since the legislative history of the Allocation Act expressly reflects Congress' intent to afford the President "full flexibility in devising the most effective and efficient means of meeting the pricrity needs of the American people identified in section 4(b)" of the Act. H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess., 12 (1973).

The agency charged with the administration of the Allocation Act has reasonably concluded that credit terms and payment schedules are inseparably related to the price of allocated products and that suppliers could disrupt the allocation of those products as readily by changing credit terms and payment schedules as by raising prices. In view of the express statutory authority to regulate allocation and prices, and the declared statutory purpose of minimizing "the adverse impacts of [petroleum] shortages and dislocations on the American people and the domestic economy," FEA's ancillary regulation of credit terms and payment schedules is within its statutory powers.[11]

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[11] Petitioner and amici counter (Pet. 14; Am. Br. 13) that FEA can prevent attempts to disrupt allocations by changes in credit terms by resorting, on a case-by-case basis, to the general prohibition, contained in 10 C.F.R. 210.62(c), against practices designed to circumvent the regulations. However, since virtually every transaction involving petroleum products also involves credit terms which directly or indirectly influence the price, volume, and timing of such transactions, it would be an impossible burden for FEA to review the credit terms established in thousands of daily transactions to insure their consistency with the regulations.

3. As the court below correctly found, to the extent the legislative history of the Allocation Act illuminates the issue, it indicates Congress intended that FEA's regulations under the Act were to be patterned on earlier regulations of the Cost of Living Council (see Pet. App. 11a-12a). The CLC regulations with respect to petroleum products governed credit terms (see p. 5 and n.6, *supra*; see also Pet. App. 8a-10a).[12] There is nothing in the legislative history of the Allocation Act that suggests that Congress intended to confer a more limited authority on FEA, or to circumscribe its power to deal effectively with the allocation of scarce petroleum products in the manner suggested by petitioner.[13]

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[12] Petitioner (Pet. 13) and amici (Am. Br. 14) dispute that fact by citing CLC rulings concerning products other than petroleum products. Those citations are inapposite to the scope of the CLC's petroleum regulations.

[13] Petitioner and amici (Pet. 3-4; Am. Br. 5) rely on the fact that Section 203(a) and (e) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 744, 745, expressly authorized the President to "stabilize prices, rents, wages, and salaries, * * * interest rates" and "finance charges." 12 U.S.C. (Supp. V) 1904, note. The court below correctly concluded (Pet. App. 12a-13a) that the absence of a similarly explicit reference to credit terms in the Allocation Act does not indicate a legislative intent to withhold from the President such authority to regulate credit agreements as is necessary effectively to regulate prices and implement the objectives of the Act. The reference in the Stabilization Act to interest rates and finance charges reflects Congress' broad purpose in that statute to counter inflation by stabilizing interest rates

4. Petitioner's contention (Pet. 9-12) that the decision below conflicts with the Temporary Emergency Court of Appeals' earlier decisions concerning regulation of real estate rentals in *Shell Oil Co.* v. *Federal Energy Administration*, *supra*, and *Atlantic Richfield Co.* v. *Zarb*, *supra*, was rejected expressly by a panel of that court and implicitly by the entire court when it denied petitioner's request for a rehearing *en banc*.

As the court emphasized in *Shell Oil Co.*, the regulations challenged in that case purported to regulate real estate rentals between suppliers and purchasers regardless of any relationship between the rental agreement and the purchase of allocated products, and they applied even where "a lessor of real property used for retailing gasoline is not in fact the supplier of the gasoline marketed at that location." 527 F. 2d at 1246. In contrast, the credit terms and payment schedules at issue here are directly related to sales of allocated products, and are thus, as the court below recognized (Pet. App. 16a), "a function of pricing and allocation" of the allocated products.[14]

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generally. The fact that the Allocation Act has different objectives and used different language in reference to those objectives does not indicate a congressional intent to withhold authority necessary and appropriate to achieve those objectives. As the court below stated (Pet. App. 13a), "[d]etailed powers necessary or convenient to the allocation and pricing authority granted with reference to the petroleum industry did not have to be spelled out, for the Congress, as well as judges, was fully cognizant of the doctrine of implied powers."

[14] The court in *Shell Oil Co.* recognized that real estate rentals may in some cases be related to the allocation and price of petroleum products and that FEA has authority under the Act and its regulations (10 C.F.R. 210.62(c)) to restrain increases in rent that in fact are used to circumvent the allocation and price regulations.

5. Amici incorrectly suggest (Am. Br. 7-8, 11) that the regulation at issue here freezes credit terms in effect between suppliers and each of their purchasers and prohibits suppliers from exercising "contemporaneous judgments as to [their] individual customer's creditworthiness and need." The regulation expressly states that "[n]othing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products * * *." 10 C.F.R. 210.62(a). The regulation thus provides suppliers flexibility to determine the appropriate credit and payment schedules for individual customers on the basis of judgments about creditworthiness and other related factors.

The regulation speaks in terms of "class of purchaser" and provides that "no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period." *Ibid.* Thus if a supplier in May 1973 had permitted a particular class of purchaser (*e.g.*, service stations) to pay sixty days after delivery, but had required certain stations within the class to pay more promptly based on creditworthiness or other nondiscriminatory factors, the regulation affords that supplier flexibility to adjust its credit arrangements with particular purchasers based on the same factors that had been applied in the base period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

STANLEY D. ROSE,
C. MAX VASSANELLI,
Attorneys.

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